Metrobus Nationwide Sdn Bhd v Lembaga Pelesenan Kenderaan Perdagangan Semenanjung Malaysia & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01–356 OF 2009
ABDUL MALIK ISHAK, AZAHAR MOHAMEDAND ANANTHAM KASINATHER JJCA
3 AUGUST 2012

Administrative Law — Judicial review — Application for — First respondent's failure to enforce rates of fare for stage buses in accordance with Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 — Whether acts of respondents resulted in unfair discrimination — Whether proven that applicant suffered loss as a result of first respondent's differential treatment of applicant

Constitutional Law — Fundamental liberties — Equality before the law — Unfair discrimination — Elements of — Whether proven — Whether differential treatment by first respondent amounted to unfair discrimination — Whether first respondent acted mala fide — Whether there been violation of art 8(1) of the Federal Constitution

The first respondent, a statutory body, granted the applicant, a company engaged in the business of providing public transport services, a licence to operate stage buses. The rates of fare for stage buses had to be in accordance with the Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 ('the Rules'). The second respondent through the Ministry of Finance ('MOF') had incorporated a vehicle, the RapidKL, for purposes of providing an integrated public transport system in the Klang Valley, which incorporated bus and rail services. The rates of fares charged by RapidKL for its bus stage services were much lower than those provided under the Rules. According to the applicant, there was a marked decline in the number of passengers using the applicant's stage buses as a result of the lower rates of fares charged by RapidKL. The applicant had appealed to the first respondent to enforce the rates of fares as prescribed under the Rules but the latter failed to take any action. The applicant also appealed to the second respondent to take necessary action by adjusting the rates of fares charged by Rapid KL but to no avail. Subsequently, the applicant filed an application for judicial review against the respondents, whereby it sought, inter alia, an order of mandamus directing the respondents to enforce the rates of fares as prescribed under the Rules on RapidKL; a declaration that the respondent's failure to enforce the rates of fare as prescribed by the Rules on RapidKL was a violation of art 8(1) of the Federal Constitution ('Constitution'); and an order of damages for the loss and damage suffered by

the applicant as a result of the first respondent's decision. The High Court judge hearing the application granted a declaration that the first respondent's decision to impose rates of fare for stage buses without adhering to the Rules was ultra vires the Rules ('the first decision'). However, the High Court judge refused to grant the order of mandamus directing the respondents to enforce the rates of fares as prescribed under the Rules or a declaration that the respondents' decision had violated art 8(1) of the Constitution or damages ('the second decision'). This was the applicant's appeal on the second decision. The thrust of the applicant's contention in this appeal was that both the respondents had practised unfair discrimination on the applicant by allowing RapidKL to charge fares without adhering to the Rules and that this constituted a violation of art 8(1) of the Constitution, which expressly provided that all persons were equal before the law and entitled to the protection of the law.

Held, dismissing the appeal with costs of RM5,000:

(1) It is trite law that executive or administrative action, which resulted in denial of equal protection of law or equality before the law was actionable and could be judicially reviewed as being violative of art 8 of the Constitution. However, three essential elements had to be proved for unfair discrimination to be actionable (see para 17).

(2) Firstly, some form of discrimination had to be proved. As regards this element, the facts disclosed that both RapidKL and the applicant were similarly situated within the same class, but that the first respondent had treated RapidKL differently by allowing it to charge fares which did not adhere to the Rules. This showed that the applicant was treated unequally by the first respondent and discrimination was proven to exist in the present case (see para 18).

(3) The second element required the discrimination to be unfair. In other words there had to be unjust or unreasonable or unfair bias in favour of one as against another. In the present case, the first respondent had exhibited a letter from the MOF, which explained the background and purpose behind the incorporation of RapidKL. From this it became clear that the element of general public interest had been taken into consideration by the first respondent for fixing differential rates of fare for stage buses. Thus, the first respondent's decision to impose lower rates of fares for such services could not be said to be arbitrary or excessive. As such, upon an objective assessment of the relevant facts of the present case, there was no unjust or unreasonable or unfair bias in favour of RapidKL. Further, the first respondent's explanation that the approval given to RapidKL to charge lower fares was based on the policy objective showed that the approval was made in good faith (see paras 19, 21–27).

(4) Thirdly the applicant had to prove resultant harm from the alleged

discriminatory act or a nexus between the reduction in its income or profits from the fare collection and the introduction of RapidKL's lower fares. However, the applicant had failed to establish that the introduction of RapidKL's fares had led it to suffer loss and other financial problems. Thus, the High Court was entirely correct in holding that there was insufficient evidence to support a finding that the respondents had practised unfair discrimination on the applicant (see paras 28–30).

[Bahasa Malaysia summary

Responden pertama, sebuah badan berkanun, telah memberikan pemohon, sebuah syarikat yang menjalankan perniagaan menyediakan perkhidmatan pengangkutan, satu lesen untuk menjalankan operasi bas berperingkat. Kadar tambang untuk bas berperingkat itu hendaklah menurut Kaedah-Kaedah Lembaga Pelesenan Kenderaan Perdagangan ('Kadar Tambang') 2000 ('Kaedah tersebut'). Responden kedua melalui Kementerian Kewangan ('KK') telah menubuhkan satu kenderaan, iaitu RapidKL, bagi tujuan menyediakan sistem pengangkutan awam berintegrasi di Lembang Klang, yang menggabungkan perkhidmatan bas dan rel. Kadar tambang yang dikenakan oleh RapidKL untuk perkhidmatan bas berperingkatnya lebih rendah daripada yang diperuntukkan di bawah Kaedah tersebut. Menurut pemohon, terdapat penurunan ketara dalam bilangan penumpang yang menggunakan bas berperingkat pemohon akibat kadar tambang yang lebih rendah dikenakan oleh RapidKL tersebut. Pemohon telah merayu kepada responden pertama untuk menguatkuasakan kadar sebagaimana yang ditetapkan di bawah Kaedah tersebut tetapi responden pertama gagal untuk mengambil apa-apa tindakan. Pemohon juga telah merayu kepada responden kedua untuk mengambil tindakan yang perlu dengan melaraskan kadar tambang yang dikenakan oleh RapidKL tetapi sia-sia. Berikutan itu, pemohon telah memfailkan permohonan untuk semakan kehakiman terhadap responden-responden, dengan memohon, antara lain, perintah mandamus mengarahkan responden-responden menguatkuasakan kadar tambang sebagaimana ditetapkan di bawah Kaedah tersebut ke atas RapidKL; deklarasi bahawa kegagalan responden untuk menguatkuasakan kadar tambang sebagaimana ditetapkan di bawah Kaedah tersebut ke atas RapidKL merupakan pelanggaran perkara 8(1) Perlembagaan Persekutuan ('Perlembagaan'); dan satu perintah ganti rugi untuk kehilangan dan kerugian yang dialami oleh pemohon akibat keputusan responden pertama. Hakim Mahkamah Tinggi yang mendengar permohonan itu telah memberikan deklarasi bahawa keputusan responden pertama untuk mengenakan kadar tambang untuk bas berperingkat tanpa mematuhi Kaedah tersebut adalah *ultra vires* Kaedah tersebut ('keputusan pertama'). Walau bagaimanapun, hakim Mahkamah Tinggi enggan memberikan perintah mandamus mengarahkan responden-responden menguatkuasakan kadar tambang sebagaimana yang ditetapkan di bawah Kaedah tersebut atau deklarasi bahawa keputusan responden-responden telah melanggar perkara 8(1) Perlembagaan atau ganti rugi ('keputusan kedua'). Ini

adalah rayuan pemohon terhadap keputusan kedua. Teras hujah pemohon dalam rayuan ini adalah bahawa kedua-dua responden telah mengamalkan diskriminasi tidak adil terhadap pemohon dengan membenarkan RapidKL mengenakan kadar tanpa mematuhi Kaedah tersebut dan bahawa ini membentuk pelanggaran perkara 8(1) Perlembagaan, yang jelas memperuntukkan bahawa semua adalah sama di sisi undang-undang dan berhak mendapat perlindungan undang-undang.

Diputuskan, menolak rayuan dengan kos RM5,000:

(1) Adalah undang-undang tetap bahawa tindakan eksekutif atau pentadbiran, yang menyebabkan penafian perlindungan saksama di sisi undang-undang atau kesaksamaan dari segi undang-undang boleh diambil tindakan dan boleh disemak semula sebagai melanggar perkara 8 Perlembagaan. Walau bagaimanapun, tiga elemen utama hendaklah dibuktikan untuk diskriminasi tidak adil agar tindakan boleh diambil (lihat perenggan 17).

(2) Pertama, suatu bentuk diskriminasi hendaklah dibuktikan. Berhubung elemen ini, fakta menunjukkan bahawa kedua-dua RapidKL dan pemohon sama-sama terletak dalam kelas yang sama, tetapi bahawa responden pertama telah menganggap RapidKL berbeza dengan membenarkannya mengenakan kadar yang tidak mematuhi Kaedah tersebut. Ini menunjukkan bahawa pemohon dilayan tidak sama dengan responden pertama dan diskriminasi dibuktikan wujud dalam kes ini (lihat perenggan 18).

(3) Elemen kedua memerlukan diskriminasi itu tidak adil. Dalam erti kata lain perlu wujud sikap berat sebelah yang tidak adil atau tidak munasabah menyebelahi satu pihak terhadap yang satu lagi. Dalam kes ini, responden pertama telah menunjukkan surat daripada KK, yang menjelaskan latar belakang dan tujuan penubuhan RapidKL. Berdasarkan ini adalah jelas bahawa elemen kepentingan pihak awam telah diambil kira oleh responden pertama dengan menetapkan kadar berbeza untuk bas berperingkat tersebut. Oleh itu, keputusan responden pertama untuk mengenakan kadar tambang lebih rendah untuk perkhidmatan sedemikian tidak boleh dikatakan sewenang-wenangnya atau melampau. Dengan itu, setelah penelitian objektif fakta relevan kes ini, tidak wujud sikap berat sebelah yang tidak adil atau tidak munasabah menyebelahi RapidKL. Bahkan, penjelasan responden pertama bahawa kelulusan yang diberikan kepada RapidKL untuk mengenakan kadar tambang lebih rendah adalah berdasarkan polisi objektif yang menunjukkan bahawa kelulusan telah dibuat dengan niat baik (lihat perenggan 19, 21–27).

(4) Ketiga, pemohon perlu membuktikan kesan menjejaskan akibat daripada tindakan diskriminasi yang dikatakan atau pertalian antara

pengurangan pendapatan atau keuntungannya daripada kutipan tambang dan pengenalan tambang lebih rendah RapidKL. Walau bagaimanapun, pemohon telah gagal untuk membuktikan bahawa pengenalan tambang RapidKL mengakibatkannya mengalami kerugian dan masalah kewangan lain. Oleh itu, Mahkamah Tinggi jelas betul dalam memutuskan bahawa tiada keterangan mencukupi untuk menyokong penemuan bahawa responden-responden telah mengamalkan diskriminasi tidak adil terhadap pemohon (lihat perenggan 28–30).]

Notes

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 254–279.

For cases on equality before the law, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) paras 2340–2361.

Cases referred to

Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang [1997] 1 MLJ 241, CA (refd)

Public Prosecutor v Khong Teng Khen & Anor [1976] 2 MLJ 166, FC (refd)

Ranbir Singh Chadha v Chief Commercial Superintendent AIR 1961 Punj 268, HC (refd)

State of West Bengal, The v Anwar Ali Sarkarhabib AIR 1952 SC 75 (refd)

Legislation referred to

Bengal Special Court (X(10) of 1950) [IND] s 5(1)
Commercial Vehicles Licensing Board Act 1987 s 3(1)
Commercial Vehicles Licensing Board (Amendment Act) 2010 Act s 9(3), (9)
Commercial Vehicles Licensing Board (Rates of Fare) Rules 2000 First Schedule, Para 1
Constitution of India [IND] art 14
Federal Constitution art 8, 8(1)
Land Public Transport Act 2010
Rules of the High Court 1980 O 53
Suruhanjaya Pengangkutan Awam Darat Act 2010

Appeal from: Application for Judicial Review No R2–25–224 of 2007 (High Court, Kuala Lumpur)

Wong Kian Kheong (Alec Tan with him) (Wong Kian Kheong) for the appellant.
Effandi Nazila bin Abdullah (Senior Federal Counsel, Attorney General's Chambers) for the respondents.

Azahar Mohamed JCA (delivering judgment of the court):

[1] This is an appeal by Metrobus Nationwide Sdn Bhd ('the applicant in the High Court') against the decision of the learned judge of the Kuala Lumpur High Court given on 30 September 2009 dismissing part of its claims against the Commercial Vehicles Licensing Board Peninsular Malaysia (the first respondent in the High Court) and the Federal Government of Malaysia (the second respondent in the High Court). For convenience and ease of reference, we will refer to parties in this judgment to the title assigned to them in the court below.

[2] The matter before the High Court was by way of judicial review under O 53 of the Rules of the High Court 1980 filed by the applicant. In essence the applicant sought for an order of mandamus and a declaration that the first respondent's decision approving the application of Rangkaian Pengangkutan Integrasi Deras Sdn Bhd ('RapidKL') to impose rates of fare for stage bus without adhering to the Commercial Vehicles Licensing Board ('Rates of Fare') Rules 2000 ('the 2000 Rules') and the failure, refusal or omission on the part of the second respondent to enforce the rates of fare as prescribed under the said 2000 Rules on RapidKL have violated art 8(1) of the Federal Constitution and the 2000 Rules.

[3] The undisputed factual background and the sequence of events leading to this appeal are as follows. The applicant is engaged in the business of providing public transport services. The first respondent is a statutory body established under s 3(1) of the Commercial Vehicles Licensing Board Act 1987 ('the 1987 Act'). The powers of the first respondent includes granting of licences to operate various classes of public service vehicles and attaching conditions to licences as the first respondent thinks fit.

[4] On 30 July 2007, the first respondent granted the applicant licences to operate stage buses as defined under the 1987 Act which means buses plying along a road approved by the first respondent for the carriage of passengers on a service which contains fare stages, with a separate fare, time-table and schedule of fare for each fare stage. The rates of fare for stage buses licensed and authorised to operate within the Peninsular Malaysia under the 1987 Act is set out in Part 1 of the First Schedule to the 2000 Rules. It is undisputed that the fares charged by the applicant for its stage bus services were, at all material times, in accordance with the 2000 Rules.

[5] In 2003, the second respondent, through a corporate entity, namely Syarikat Prasarana Negara Bhd ('SPNB'), took over, among others, the routes

and buses of two public transport companies which provided stage bus services in the Klang Valley, namely Intrakota Komposit Sdn Bhd ('Intrakota') and Cityliner Sdn Bhd ('Cityliner'). A

[6] On 26 July 2004, the second respondent through the Ministry of Finance incorporated RapidKL for purposes of providing an integrated public transport system in Klang Valley incorporating bus and rail services. Not long after that, around November 2004, SPNB handed over the operations of, among others, stage bus services of Intrakota and Cityliner to RapidKL. B

[7] There is one point which needs to be emphasised here, which turned out to be of critical importance in the dispute between the respective parties herein. The rates of fares charged by RapidKL for its stage bus services, which were approved by the first respondent, were much lower as compared to the rates of fare provided under the 2000 Rules. It is the basic complaint of the applicant that it has incurred huge losses as a direct consequence to the lower rates charged by RapidKL with the marked decline in the number of passengers using the applicant's stage buses. The dispute in this case is centered on this basic complaint. According to the applicant, it had suffered loss and other financial problems as a result of the introduction of the RapidKL's fares. C D E

[8] The applicant then appealed to the first respondent and or the second respondent on various occasions through meetings as well as letters, to take all necessary action to resolve its problems. F

[9] It appears that despite the applicant's appeals, the first respondent and or the second respondent failed, refused or omitted to take any action with regard to RapidKL's fares. Following that, on 10 August 2007, the applicant's solicitors sent a letter of demand to the first respondent seeking the first respondent to, among others, enforce the rates of fare as prescribed under the 2000 Rules on RapidKL. The reply to the applicant's solicitor letter was a letter dated 28 August 2007 from the first respondent which reads: G

Ruj Kami: MECD:LPKP/20/S/204/ H

1/2 Jld 3(59)

Tarikh 28 Ogos 2007

Wong Kian Kheong Advocates & Solicators,

Unit 3A-02, Level 3A, Block B, HP Towers, No. I

12, Jalan Gelanggang, Damansara Height, 50490

KUALA LUMPUR. Faks: 03-20950281

Tuan,

PENGENALAN KADAR TAMBANG BAS BERHENTI-HENTI YANG BERBEZA UNTUK LALUAN YANG SAMA OLEH RANGKAIAN PENGANGKUTAN INTEGRASI DERAS SDN. BHD.

Dengan hormatnya surat tuan ruj. WKK/103/07 bertarikh 10 Ogos 2007 berhubung perkara di atas adalah dirujuk.

2. Untuk makluman, Lembaga Pelesenan Kenderaan Perdagangan (LPKP) dalam mesyuaratnya bil. 7/2006 bertarikh 28 Mac 2006 telah meluluskan kadar tambang yang dipohon dan digunapakai oleh syarikat Rangkaian Pengangkutan Integrasi Deras Sdn. Bhd. (RapidKL) selaras peruntukan seksyen 19 Akta LPKP 1987.

3. Sehubungan dengan itu, Lembaga juga bersedia untuk menimbang permohonan termasuk daripada syarikat Metrobus Nationwide Sdn. Bhd. bagi mengguna pakai kadar tambang seperti yang telah diluluskan kepada syarikat RapidKL.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

'CEMERLANG, GEMILANG, TERBILANG'

Saya yang menurut perintah,

(NAIMAH BINTI RAMLI)

Pengarah

Lembaga Pelesenan Kenderaan Perdagangan

Kementerian Pembangunan Usahawan dan Koperasi.

[10] Subsequently, as we have indicated earlier, the applicant had on 11 September 2007 filed the judicial review application seeking the following reliefs:

(a) an order of mandamus directing the first respondent and second respondent to enforce the rates of fare as prescribed under the 2000 Rules on RapidKL;

(b) a declaration that:

(a) the first respondent's decision on 28 March 2006 approving RapidKL's application to impose rates of fare for stage buses as defined under the 1987 Act without adhering to the said Rules (the first respondent's decision); and

(b) failure, refusal or omission on the part of the first respondent and or on the part of the second respondent to enforce the rates of fare as prescribed under the said 2000 Rules on RapidKL.

— have violated art 8(1) of the Federal Constitution and the said Rules.

(c) an order of damages to be paid by the first respondent and the second respondent to the applicant for the loss and damage suffered by the applicant as a result of the first respondent's decision and the first respondent and or the second respondent's abovesaid failure, refusal or omission and for the amount of damages to be assessed by the court; and

(d) an order that the first respondent and the secod respondent to pay to the applicant interest at the rate of 8%pa on the said damages from the date of assessment until full satisfaction of the damages.

[11] In its application for judicial review, the applicant relied on the following grounds in support of the application:

(a) the first respondent's decision was ultra vires the 2000 Rules;

(b) the first respondent had failed to take into account relevant considerations in arriving at its decision;

(c) in arriving at its decision, the first respondent and the second respondent had acted in such a manner that no reasonable public authority in similar circumstances would have acted;

(d) the applicant had been unfairly discriminated by the first respondent and or the second respondent as a result of the first respondent's decision as well as the first respondent's and or the second respondent's failure, refusal or omission to enforce the rates of fare as prescribed under the said 2000 Rules on RapidKL;

(e) the first respondent's decision as well as the abovesaid failure, refusal or omission on the part of the first respondent and or the second respondent had violated the applicant's rights under art 8(1) of the Federal Constitution; and

(f) the first respondent and or the second respondent had violated the applicant's legitimate expectation.

[12] One important fact requires to be kept in mind. With effect from 31 January 2011, the 1987 Act ceased to apply to Peninsular Malaysia and the first respondent was accordingly dissolved. Notwithstanding the dissolution of the first respondent, s 9(3) of the Commercial Vehicles Licensing Board (Amendment Act) 2010 Act (the 2010 Act) provides that the liabilities which immediately before 31 January 2011 were those of the first respondent shall devolve on the Suruhanjaya Pengangkutan Awam Darat ('SPAD') as from that date. In this regard, Suruhanjaya Pengangkutan Awam Darat Act 2010 came into operation on 3 June 2010. By virtue of s 9(9) of the 2010 Act, this appeal may be continued against SPAD as it might have been continued against the first respondent as if the Land Public Transport Act 2010 had not been passed.

[13] Continuing with the sequence of events, on 30 September 2009 the learned judge made the following decisions:

(a) granted a declaration that the first respondent's decision on 28 March 2006 approving RapidKL's application to impose rates of fare for stage buses without adhering to the 2000 Rules as being ultra vires the said 2000 Rules (the first decision);

(b) refused to grant the following relief (the second decision):

(i) order of mandamus as there is no specific duty imposed on the first respondent and second respondent to enforce the 2000 Rules under the 1987 Act;

(ii) a declaration that the first respondent's decision and the first respondent and or the second respondent failure have violated art 8(1) of the Federal Constitution as based on the affidavits filed herein there was insufficient evidence for this court to find that the first and second respondents unfairly discriminated against the applicant in favour of RapidKL;

(iii) damages; and

(iv) interest.

[14] The applicant being dissatisfied with part of the decision of the learned judge appealed to this court against the second decision.

[15] When the appeal came before this court, learned counsel for the applicant chose to abandon completely the mandamus relief. In effect, learned counsel restricted the applicant's appeal to just one ground only, namely for a declaration that the first respondent's decision approving RapidKL's application to impose rates of fare for stage buses without adhering to the 2000 Rules and or the failure of the first and second respondents to enforce the rates of the 2000 Rules on RapidKL had violated art 8(1) of the Federal Constitution and for that reason damages is claimable.

[16] As in the High Court, it is not contended by the applicant before this court that the 1987 Act and or the 2000 Rules are discriminatory. Instead, the thrust of the applicant's contention is that both the first and second respondents had practised unfair discrimination on the applicant. The applicant's contention is that the first respondent as the administrative authority entrusted and assigned with the duty and responsibility of carrying the 1987 Act and the 2000 Rules into operation, has acted in a discriminatory manner by treating equals differentially or by not following the policy or principle laid down in that statute regarding its exercise of such a discretion. In this regard, it is the argument of learned counsel for the applicant that both the

applicant and RapidKL provide the same stage bus services. Hence, the applicant and RapidKL fall within the same class of public vehicle services as classified by Parliament in the 1987 Act. Though similarly situated within the same class, it was argued that the first respondent had treated RapidKL differently by allowing RapidKL to charge fares, without any need to adhere to the 2000 Rules. It was then argued that the constitutional right of the applicant under art 8(1) of the Federal Constitution had been violated as a result of the administrative action of both the first and second respondents because the first respondent has treated the applicant and RapidKL differently in terms of the fares to be charged for the same stage bus services; and that the first respondent did not follow the 2000 Rules in regulating its powers to impose condition under the 1987 Act. Learned counsel then brought to the attention of this court the judgment of the Court of Appeal in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 24 to support the proposition that unfair discrimination is an actionable wrong under our law and that damages is claimable if there is a breach of art 8 of the Federal Constitution.

[17] As a starting point, art 8(1) of the Federal Constitution expressly provides that all persons are equal before the law and entitled to the equal protection of the law. It is trite law that executive or administrative action which resulted in denial of equal protection of law or equality before law is actionable and can be judicially reviewed as being violative of art 8 of the Federal Constitution. In *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang*, the Court of Appeal laid down three essential elements that must be proved in order to succeed in establishing unfair discrimination. These elements were explained by Abdul Malek Ahmad JCA (as His Lordship then was) in the following words:

> In our judgment, for unfair discrimination to be actionable, the following elements must be proved to exist:
>
> (a) there must be some form of discrimination;
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> (b) the discrimination must be unfair; and
>
> (c) there must be resultant harm or injury
>
> Taking the first ingredient, a plaintiff, in order to succeed in an action for unfair discrimination, must establish that discrimination was practised upon him. Generally speaking, discrimination usually occurs when equals are treated unequally or when unequals are treated equally. See *All India Sainik Schools Employees Association v The Defence Minister-cum-Chairman, Board of Governors, Sainik School Society, New Delhi & Ors* AIR 1989 SC 88 at p 92. However, it all depends upon the facts of a given case. It is the conduct of the defendant towards the particular plaintiff that calls for attention and not particular acts or omissions. But this statement must not be taken too far. For, cases may occur where a single act or omission on the part of the defendant may have a continuing discriminatory effect upon the plaintiff. Take the case of promotions in the sphere of employment. If a

plaintiff's promotion is withheld while another who is similarly circumstanced is promoted, it is but one act, or more appropriately, one omission. Nevertheless, it has a discriminatory effect upon the plaintiff. Whether discrimination was practised in a particular case is a question of fact depending upon the facts and circumstances of the given case. See *Indian Oil Corp Ltd v Premier Road Carriers Ltd* AIR 1983 Cal 445.

Discrimination perse is not actionable unless it is also unfair, and this brings us to the second ingredient. To be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words, there must be unjust or unreasonable or unfair bias in favour of one and against another. See *Dost Mohammod v Union of India* 1981 Lab IC 1210; *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268. Generally speaking, there must be a rational nexus between the conduct complained of as amounting to discrimination and the object that is that nexus may be based on sociological or economic or cultural considerations. But the reference to the existence of such a nexus is merely a guide. At the end of the day, an objective assessment of the facts of a particular case should leave the court with the impression that a plaintiff has received harsh, unreasonable or unfair treatment in the hands of the defendant.

The third ingredient of the wrong is damage. One who claims to have suffered unfair discrimination in the hands of another cannot succeed unless he is able to demonstrate that he has suffered some injury recognised by law. The injury may take the form of pecuniary loss. Or it may be non-pecuniary, such as injury to reputation or to property or to livelihood. So long as there is some injury which the law recognises, the third requirement is met.

[18] As regards the first element, the facts disclosed that both RapidKL and the applicant provide stage bus services. Both RapidKL and the applicant fall within the regulatory ambit of the 1987 Act and come under the licensing control of the first respondent. Rates of fares for stage bus services are provided in the 2000 Rules. Yet, RapidKL's fares are much lower as compared to the rates of fare provided under the rates of the 2000 Rules. Though similarly situated within the same class, the first respondent had treated RapidKL differently by allowing RapidKL to charge fares, without any need to adhere to the 2000 Rules. By reasons of the matters aforesaid, it is the argument of learned counsel for the applicant that discrimination is practised upon the applicant because though in similar circumstances, RapidKL and the applicant are treated differently. We find this argument persuasive. The principle underlying art 8 of the Federal Constitution is that a law must operate alike on all persons under like circumstances (per Suffian LP in *Public Prosecutor v Khong Teng Khen & Anor* [1976] 2 MLJ 166). Discrimination occurred in the present case as the applicant was treated unequally by the first respondent.

[19] Having said that, we now turn to the second element, that is to say the discrimination must be unfair. This is a crucial issue into which we must look more closely. On this issue, it is the arguments of learned counsel for the

applicant that the learned judge ought to have found that the applicant had received unfair treatment in the hands of the second respondent based on the following undisputed facts:

(a) RapidKL is a wholly-owned company of the second respondent;

(b) RapidKL is the 'vehicle' incorporated by the second respondent to implement an integrated public transport system in Klang Valley incorporating bus and rail services;

(c) the first and or second respondents had omitted to take action against RapidKL despite the applicant's appeals;

(d) the first and or second respondents had failed to implement the rates of fare in the 2000 Rules despite the letter of demand issued by the applicant's solicitor; and

(e) the first respondent's decision of 28 March 2006 violated the 1987 Act and the 2000 Rules.

[20] The same arguments were in point of fact canvassed before the learned judge, who after that made the following findings:

> To my mind the facts relied on by the applicant to show unfair discrimination ie that RapidKL is a wholly-owned company of the second respondent; RapidKL is a 'vehicle' incorporated by the second respondent to implement INSPAK; that the first and or second respondents had omitted to take action against RapidKL despite the applicant's appeals and the first and or second respondent had failed to implement the rates of fare in the said Rules despite the applicant's letter of demand to that effect (see paragraph 24 of encl (3)) do not leave the court with the impression that the applicant had received 'harsh, unreasonable or unfair treatment' in the hands of the respondents such that the applicant could be said to be unfairly discriminated against.
>
> This is particularly so in the light of the first respondent's reply that 'Respondent Pertama tidak pernah menghalang mana-mana pihak termasuk Pemohon untuk mengemukakan permohonan bagi menggunapakai kadar tambang sama sepertimana RapidKL' (see para 13.3, encl (12)). Further according to the first respondent —
>
> > '… sehingga kini. Pemohon adalah merupakan satu-satunya syarikat bumiputra yang mendapat lesen bas berhenti-henti yang terbanyak di Lembah Kelang.' (see para 16.4, encl (12)).

[21] As mentioned earlier, to be actionable, discrimination must be accompanied by an element of harshness or unfairness. In other words there must be unjust or unreasonable or unfair bias in favour of one and against another. In the context of the case at hand, the applicant must establish that the introduction of RapidKL fares was unjust or unreasonable or unfair bias in

favour of RapidKL and against the applicant. The question at issue is primarily whether, upon an objective assessment of the facts of the present case, the differential treatment by the first respondent amount to undue preference or unreasonable discrimination. In determining this question various factors must be taken into consideration, including the general public interest. This point is not without authority. In *Ranbir Singh v Chief Commercial Superintendent* AIR 1961 Punj 268 the court considered the question whether the differential treatment by the railway authorities is unreasonable. On this issue, at p 271 the court said:

> Whenever there is a differential treatment by the railway company, then the question ahses whether such treatment amounts to undue preference or unreasonable discrimination or distinction. There is no precise formula for determining this question with accuracy. There are many factors which must be taken into consideration for this purpose. It is impossible to describe the various factors which have to be taken into consideration for deciding this matter.
>
> To give a few examples, different transport conditions, facilities available at the destination station, and competition with other kinds of transport are some of the factors that require consideration for determining whether the distinctive or differential treatment is reasonable or not The general public interest and the effect of charges on the development of the country as a whole have been considered to be good grounds for fixing differential rates both in England and America.

[22] The case of *Ranbir Singh v Chief Commercial Superintendent* was referred by Abdul Malek Ahmad JCA (as His Lordship then was) in *Ahmad Tajudin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* when His Lordship explained the prerequisite of unfair discrimination.

[23] In the present case, the applicant has acknowledged that on 26 July 2004, the second respondent through the Ministry of Finance had incorporated RapidKL for purposes of providing an integrated public transport system in Klang Valley incorporating bus and rail services (see the first affidavit of the first respondent at para 11). But most significantly, the first respondent has explained that the approval given to RapidKL's fares was based on the policy and strategy of providing an integrated public transport services in the Klang Valley. The first respondent's affidavit affirmed by a director of the first respondent dated 30 April 2008, inter alia, avers as follows:

> … saya menyatakan bahawa kelulusan Kadar Tambang mengikut Jenis Perkhidmatan yang diberikan kepada RapidKL adalah berasaskan kepada matlamat dasar dan polisi INSPAK.

[24] In the first respondent's affidavit, a letter from the Ministry of Finance dated 24 April 2008 is exhibited which explained the background and purpose behind the incorporation of RapidKL. The letter reads as follows: **A**

KK/BMKD(S)10/727/830/1 JD.3(2)

24 April 2008 **B**

Pengarah

Lembaga Pelesenan Kenderaan Perdagangan

Kementerian Pembangunan Usahawan dan Koperasi **C**

Aras 4, Blok Podium

Lot 2G6, Presint 2

Pusat Pentadbiran Kerajaan Persekutuan

62100 PUTRAJAYA **D**

(up: Encik Ismail Che Hussain)

Tuan,

Permohonan Maklumat Penubuhan Syarikat Prasarana Negara Bhd dan Syarikat Rangkaian Pengangkutan Integrasi Deras Sdn Bhd **E**

Dengan hormatnya saya diarah merujuk kepada surat Lembaga Pelesenan Kenderaan Perdagangan bertarikh 19 Mac 2008 berhubung perkara tersebut di atas dan ingin dimaklumkan bahawa Jemaah Menteri di dalam mesyuaratnya pada 15 Oktober 2003 telah mengambil maklum perkara-perkara berikut: **F**

(i) Bagi mengatasi masalah pengangkutan awam yang tidak memuaskan akibat dikendalikan oleh banyak syarikat pengangkutan awam, sebuah Jawatankuasa Pemandu telah ditubuhkan di Jabatan Perdana Menteri untuk mengkaji langkah-langkah mengatasi masalah pengangkutan awam di Lembah Kelang; **G**

(ii) Jawatankuasa Pemandu mengesyorkan penyusunan semula pengangkutan awam adalah dengan mengasingkan pemilikan aset dan operasi iaitu dengan mewujudkan Pemilik Aset Utama (Main Asset Owner) dan Pengusaha Utama (Master Operator);

(iii) Struktur penyusunan semula adalah seperti berikut: **H**

Pemilik Aset Utama (Main Asset Operator) —Aset LRT PUTRA, LRT STAR, Parkmay dan Intrakota akan dimiliki oleh Kerajaan di bawah Syarikat Prasarana Negara Berhad (SPNB). Aset ini akan dipajakkan kepada Pengusaha Utama melalui Perjanjian Pajakan; dan **I**

Pengusaha Utama (Master Operator) — Perkhidmatan LRT PUTRA, LRT STAR, Parkmay dan Intrakota akan dikendalikan oleh sebuah syarikat swasta baru;

2. Ekoran daripada keputusan Jemaah Menteri tersebut, Kementerian Kewangan telah menubuhkan Syarikat Rangkaian Pengangkutan Integrasi Deras Sdn Bhd (RapidKL) pada 26 Julai 2004 sebagai sebuah syarikat pengendali sistem pengangkutan awam Lembah Kelang, manakala Syarikat Prasarana Sdn Bhd yang ditubuhkan pada 11 Ogos 1998 kekal sebagai pemilik utama aset pengangkutan awam.

3. Bersama-sama ini dikemukakan juga maklumat asas berhubung dengan Prasarana dan RapidKL seperti berlampir untuk perhatian tuan jua.

Sekian, terima kasih.

'BERKHIDMAT UNTUK NEGARA'

Saya yang menurut perintah,

(ESHAH BINTI MEOR SULAIMAN)

Setiausaha Bahagian Pelaburan, MKD dan Penswastaan

b.p. Ketua Setiausaha Perbendaharaan.

s.k. TKSP (S&K)

[25] The basic fact that can be gleaned from the above is that the element of general public interest has been taken into consideration by the first respondent for fixing differential rates of fare for stage buses. From this, it seems clear to us that the first respondent's decision on 28 March 2006 approving RapidKL's application to impose lower rates of fares for such services cannot be said to be arbitrary or excessive. In our judgment, upon an objective assessment of all the relevant facts of the present case, the introduction of RapidKL fares were not unjust or unreasonable or unfair bias in favour of RapidKL. There is legitimate reason necessitating the first respondent allowing RapidKL to impose fares for stage buses without adhering to rates of fare as prescribed under the 2000 Rules. On the basis of the factual matrix and the circumstances prevailing in the present case, in our judgment, this departure or deviation is rational and reasonable and should not be suggestive of discrimination or arbitrariness as it would serve the general public interest of providing a better and efficient public transport services in the Klang Valley.

[26] There is another reason why we have come to the above conclusion. When the 2000 Rules is not itself discriminatory and the present claim of unfair discrimination is against the first respondent who is entrusted with the duty of carrying it into operation, in our judgment, the first respondent has a good defence if it could prove that it has acted bona fides on its part. The

authority to support this principle is the case of *The State of West Bengal v Anwar Ali Sarkarhabib* AIR 1952 SC 75, where the Supreme Court of India considered the question of whether s 5(1) of the Bengal Special Courts (X(10) of 1950) was ultra vires art 14 of the Constitution of India (which is equivalent to art 8 of the Federal Constitution). Mukherjea J speaking on the subject of defence of bona fide said at p 92 of the report as follows:

> It appears to be an accepted doctrine of American courts that the purpose of the equal protection clause is to secure every person, within the states against arbitrary discrimination whether occasioned by the express terms of the statute or by their improper application through duly constituted agents: This was clearly laid down in *Sunday Lake Iron Co v Wakefield* (1918) 247 US 350. In this case, the complaint was against a taxing officer, who was alleged to have assessed the plaintiff's properties at their full value, while all other persons in the country were assessed at not more than one third of the worth of their properties. It was held that the equal protection clause could be availed if against the taxing officer; but if he was found to have acted bona fides and the discrimination was the result of a mere error of judgment on his part, the action would fail. The position, therefore, is that when the statute is not itself discriminatory and the charge of violation of equal protection is only against the official, who is entrusted with the duty of carrying it into operation, the equal protection clause could be availed of in such cases, but the officer would have a good defence if he could prove bona fides.

[27] Coming back to the present case, there is nothing to show that the first respondent had acted mala fide or out of improper motive. This then refers back to what we have said earlier. The first respondent's explanation that the approval given to RapidKL's fares was based on the policy objective of providing an integrated public transport services in the Klang Valley proved that the approval was made in good faith or at least with bona fide intention.

[28] From this point on, we shall deal with the third element, that is to say, damage or resultant injury arising from the alleged discriminating act. It is the contention of the applicant that there is clear evidence to show that the first respondent's decision in approving lower rates of fare charged by RapidKL had led the applicant to suffer massive financial losses as a result of sharp decline in the number of passengers in the applicant's stage bus services since 21 April 2007. This is the essence of his arguments. On this issue, the learned judge made the following findings:

> … I agree with the SFC's submission that the applicant has failed to show by credible and cogent evidence that the abovesaid loss was due to the lower rates of fare charged by RapidKL. In other words the applicant had failed to establish a nexus between the reduction in the applicant's income or profits from the fare collection with the introduction of RapidKL's fares. The purported reduction in the daily and monthly fare collection as shown in exh A7(b) (Pp 51 of encl 3) was not based on any study or survey carried out by the applicant. As submitted by the learned SFC, the reduction in the number of passengers after 21 April 2007 as contended by the

applicant (and the consequent loss of profits or income) could be due to a variety of factors which may or may not include the lower fares charged by RapidKL In the absence of such a survey or study or any other form of verification I would agree with the respondents' contention that the applicant's claim that the abovesaid loss was attributable the first respondent's decision was purely an assumption on the part of the applicant. The applicant had therefore failed to establish that it had suffered any resultant harm or injury from the alleged discriminatory act.

[29] We have carefully read the whole of the evidence in the appeal record. In vain we searched through the record for concrete evidence of any nexus to show that the financial difficulty suffered by the applicant was mainly caused by RapidKL's fares which was much lower as compared to the rates of fare provided under the 2000 Rules. In this regard, it must be noted the chairman of the first respondent in his affidavit in reply dated 4 March 2008 at para 13, has explained that RapidKL's *modus operandi* is different from that of the applicant. It is a valid argument to make that the choice of consumers is not dictated solely by the lowering of fares. More than that, the financial difficulty by the first respondent suffered could very well be due to different transportation environment, facilities available, volume of traffic, management skill, strategic planning and other range of causes, which may not include the lower fares charged by the RapidKL. As stated by the learned judge and we respectfully agree with her, the purported reduction in the daily and monthly fare collection was not based on any credible study or market survey carried out by the applicant. To which we will add that in a substantive motion for judicial review, the applicant has the evidential burden to establish a nexus between the reduction in the applicant's income or profits from the fare collection with the introduction of RapidKL's fares. A person who asserts the existence of any fact must prove the fact exists. Viewed in this context, on the facts, we conclude by saying that the applicant has failed to establish that the introduction of RapidKL's fares had led the applicant to suffer loss and other financial problems.

[30] It therefore follows the learned judge was entirely correct in holding that there was insufficient evidence to support a finding that the first respondent and or the second respondent had practised unfair discrimination on the applicant.

[31] It is for all these reasons that we dismiss this appeal with costs of RM5,000. Deposit to the respondents to account of costs.

Appeal dismissed with costs of RM5,000.

Reported by Kohila Nesan